

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARMONDO GIBB ORTEGA,  
Petitioner,

v.

JOHN W. HAVILAND,  
Respondent.

No. 09-02556 CW

ORDER DENYING  
PETITION FOR WRIT  
OF HABEAS CORPUS

On June 9, 2009, Petitioner Armondo Gibb Ortega, a state prisoner currently incarcerated at California State Prison, Solano in Vacaville, California, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his incarceration. Petitioner is represented by counsel. Respondent filed an answer. On September 9, 2009, Petitioner filed a traverse. Having considered all the papers submitted by the parties, the Court DENIES the petition for writ of habeas corpus.

BACKGROUND

On July 7, 2003, Petitioner proceeded to trial to the court, having waived a jury. The victim, who was six years old at the time of the offense, testified that Petitioner molested her approximately two to three times in each of two separate locations. Resp.'s Ex. 15 at 2. The court had evidence of Petitioner's prior

1 conviction under California Penal Code section 288. Resp.'s Ex. 15  
2 at 4. Petitioner was convicted of six counts of committing a lewd  
3 and lascivious act on a child, California Penal Code  
4 section 288(a), and one count of failing to register as a sex  
5 offender, California Penal Code section 290(a). The court found  
6 Petitioner had a prior "strike" conviction, California Penal  
7 Code section 1170.12, and a prior violent felony conviction,  
8 California Penal Code section 667(a).

9 Petitioner moved for the appointment of new counsel to  
10 represent him in a motion for new trial, contending that his  
11 counsel inadequately represented him. The court found counsel was  
12 adequate and denied the motion. At sentencing on December 4, 2003,  
13 Petitioner presented his motion for a new trial by reading it to  
14 the court. The court denied the motion.

15 The court sentenced Petitioner to 134 years and four months to  
16 life in prison. Sentences on all counts were doubled due to  
17 Petitioner's prior conviction and were imposed consecutively.

18 Petitioner timely appealed to the California court of appeal  
19 claiming there were ten reversible errors at trial. On November 9,  
20 2005, the court of appeal filed an unpublished opinion rejecting  
21 Petitioner's claims and affirming the judgment. Resp.'s Ex. 7.  
22 The California court of appeal denied a petition for rehearing on  
23 December 6, 2005. Resp.'s Ex. 9. The California Supreme Court  
24 denied review on February 22, 2006. Resp.'s Ex. 11.

25 On February 20, 2007, the United States Supreme Court granted  
26 Petitioner's petition for a writ of certiorari, vacated the  
27 judgment of the California court of appeal, and remanded the case  
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1 to the California court of appeal for further consideration in  
2 light of Cunningham v. California, 549 U.S. 270 (2007) (holding  
3 that California's determinate sentencing law (DSL) was  
4 unconstitutional because factors that increased the length of a  
5 prisoner's sentence beyond the statutory maximum were not found by  
6 a jury or proven beyond a reasonable doubt). Resp.'s Ex. 12.

7 On November 5, 2007, the California court of appeal issued an  
8 unpublished opinion affirming the judgment. Resp.'s Ex. 15. The  
9 California Supreme Court denied review on January 16, 2008.  
10 Resp.'s Ex. 17. The United State Supreme Court denied Petitioner's  
11 petition for a writ of certiorari on June 23, 2008. Resp.'s Ex.  
12 19.

#### 13 LEGAL STANDARD

14 A federal court may entertain a habeas petition from a state  
15 prisoner "only on the ground that he is in custody in violation of  
16 the Constitution or laws or treaties of the United States."

17 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death  
18 Penalty Act of 1996 (AEDPA), a district court may not grant habeas  
19 relief unless the state court's adjudication of the claim:

20 "(1) resulted in a decision that was contrary to, or involved an  
21 unreasonable application of, clearly established federal law, as  
22 determined by the Supreme Court of the United States; or

23 (2) resulted in a decision that was based on an unreasonable  
24 determination of the facts in light of the evidence presented in  
25 the State court proceeding." 28 U.S.C. § 2254(d); Williams v.  
26 Taylor, 529 U.S. 362, 412 (2000). The first prong applies both to  
27 questions of law and to mixed questions of law and fact, id. at  
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1 407-09, and the second prong applies to decisions based on factual  
2 determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

3 A state court decision is "contrary to" Supreme Court  
4 authority, that is, falls under the first clause of § 2254(d)(1),  
5 only if "the state court arrives at a conclusion opposite to that  
6 reached by [the Supreme] Court on a question of law or if the state  
7 court decides a case differently than [the Supreme] Court has on a  
8 set of materially indistinguishable facts." Williams, 529 U.S. at  
9 412-13. A state court decision is an "unreasonable application of"  
10 Supreme Court authority, under the second clause of § 2254(d)(1),  
11 if it correctly identifies the governing legal principle from the  
12 Supreme Court's decisions but "unreasonably applies that principle  
13 to the facts of the prisoner's case." Id. at 413. The federal  
14 court on habeas review may not issue the writ "simply because that  
15 court concludes in its independent judgment that the relevant  
16 state-court decision applied clearly established federal law  
17 erroneously or incorrectly." Id. at 411. Rather, the application  
18 must be "objectively unreasonable" to support granting the writ.  
19 Id. at 409.

20 If constitutional error is found, habeas relief is warranted  
21 only if the error had a "'substantial and injurious effect or  
22 influence in determining the jury's verdict.'" Penry v. Johnson,  
23 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S.  
24 619, 638 (1993)).

25 When there is no reasoned opinion from the highest state court  
26 to consider the petitioner's claims, the court looks to the last  
27 reasoned opinion of the highest court to analyze whether the state  
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1 judgment was erroneous under the standard of § 2254(d). Ylst v.  
2 Nunnemaker, 501 U.S. 797, 801-06 (1991); Shackleford v. Hubbard,  
3 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). In the present case, the  
4 California court of appeal is the highest court that addressed  
5 Petitioner's claims.

6 DISCUSSION

7 Petitioner supports his petition for a writ for habeas corpus  
8 with three separate claims: (1) that the trial court forced him to  
9 argue his motion for a new trial without the assistance of counsel;  
10 (2) that he was penalized for exercising his right to a trial; and  
11 (3) that he was denied a trial by jury as to whether he suffered a  
12 prior conviction and was ineligible for probation.

13 I. Right to Counsel

14 Petitioner contends that he was denied his Sixth Amendment  
15 right to counsel when he submitted his motion for a new trial  
16 because, although defense counsel was physically present, he did  
17 nothing, and Petitioner himself argued the motion for new trial.

18 After his conviction, Petitioner filed a motion requesting the  
19 appointment of new counsel to represent him in a new trial motion,  
20 contending defense counsel had been ineffective. Resp.'s Ex. 15 at  
21 12. The trial court found that counsel was not ineffective and  
22 denied the motion to appoint conflicts counsel. Resp.'s Ex. 15 at  
23 12. On December 4, 2003, with defense counsel present, the trial  
24 court heard Petitioner's new trial motion, which it denied.  
25 Resp.'s Ex. 15 at 13.

26 In its November 5, 2007 opinion, the court of appeal found  
27 that defense counsel assisted Petitioner in his motion for new  
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1 trial by ensuring that the court would hear the motion and by  
2 providing citations to Petitioner when he was reading his motion to  
3 the court. Resp.'s Ex. 15 at 13. On this basis, the court  
4 rejected Petitioner's claim that he was forced to file a new trial  
5 motion without the assistance of counsel. Resp.'s Ex. 15 at 13.

6 The right to counsel is fundamental to a fair trial as  
7 guaranteed by the Sixth Amendment and is binding on the states  
8 under the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S.  
9 335, 342 (1963). In Powell v. Alabama, 287 U.S. 45, 68-69 (1932),  
10 the Court recognized that "[e]ven the intelligent and educated  
11 layman . . . requires the guiding hand of counsel at every step in  
12 the proceedings against him. Without it, though he be not guilty,  
13 he faces the danger of conviction because he does not know how to  
14 establish his innocence."

15 A defendant's right to be represented by counsel is a  
16 fundamental component of the criminal justice system. United  
17 States v. Cronic, 466 U.S. 648, 653 (1984). A defendant's right  
18 has been denied and his trial prejudiced (1) if there is a complete  
19 denial of counsel; (2) if counsel fails to subject the prosecution  
20 to meaningful adversarial testing; or (3) if assistance is so  
21 deficient that a presumption of prejudice is appropriate. Id. at  
22 659-60. Only if counsel is totally absent, or prevented from  
23 assisting the defendant, is there a complete denial of counsel.  
24 Id. at 659.

25 The California court of appeal found that Petitioner was  
26 represented by counsel for the entirety of the proceedings and,  
27 specifically, that Petitioner was represented by counsel when he  
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1 presented his motion for a new trial. Resp.'s Ex. 15 at 13. The  
2 court based this on the fact that when Petitioner presented his  
3 motion for a new trial, defense counsel was present, ensured that  
4 the court had consented to having Petitioner read the motion and  
5 provided case citations to Petitioner. Resp.'s Ex. 15 at 13. The  
6 court of appeal's analysis is consistent with the Supreme Court's  
7 reasoning in Cronic. Defense counsel was not totally absent, nor  
8 prevented from assisting Petitioner. The court of appeal was not  
9 unreasonable in finding that Petitioner was represented by counsel  
10 in his motion for a new trial, in accordance with the Sixth  
11 Amendment and the Supreme Court's rulings in Gideon and Powell.  
12 Therefore, the court's denial of Petitioner's claim was not  
13 contrary to or an unreasonable application of Supreme Court  
14 authority.

## 15 II. Exercise of Right to Trial

16 Petitioner contends that he was penalized for exercising his  
17 right to trial because of the difference between the 134 year  
18 sentence imposed by the court and an initial plea bargain offer of  
19 sixteen years, which he refused. Petitioner argues that, because  
20 no new evidence was adduced between the preliminary examination and  
21 the sentencing, his sentence was punishment for exercising his  
22 right to trial.

23 In its opinion on direct review, the court of appeal, relying  
24 on California law, held that a sentence based on a trial court's  
25 consideration of a defendant's decision to go to trial instead of  
26 pleading guilty is unconstitutional. However, the court determined  
27 that nothing said by the trial court indicated that the sentence  
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1 imposed resulted from Petitioner's exercise of his constitutional  
2 right to trial. Resp.'s Ex. 15 at 16. The court found that  
3 Petitioner was convicted of six counts of sexual abuse, and the  
4 bargained-for sentence was offered for a plea to only one count.  
5 Resp.'s Ex. 15 at 17. The court concluded that the disparity  
6 between the initial plea offer and the ultimate sentence imposed  
7 alone was not enough to demonstrate that Petitioner had been  
8 penalized for exercising his right to trial.

9 The Sixth Amendment directs, in relevant part, "In all  
10 criminal prosecutions, the accused shall enjoy the right to a  
11 speedy and public trial." U.S. Const. amend. VI. A sentencing  
12 scheme that penalizes a criminal defendant for exercising his right  
13 to a jury trial is unconstitutional. Grisby v. Blodgett, 130 F.3d  
14 365, 369-70 (9th Cir. 1997). However, the Supreme Court has firmly  
15 established that the prosecutor's offer of an attractive sentence  
16 to a defendant in return for a guilty plea does not violate the  
17 Constitution. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).  
18 The prosecutor's interest at the bargaining table to persuade the  
19 defendant to forgo his right to plead not guilty is  
20 constitutionally legitimate. Id. Plea bargaining does not violate  
21 due process even though a defendant may feel considerable pressure  
22 to plead guilty in return for a more lenient penalty. McKune v.  
23 Lile, 536 U.S. 24, 42 (2002).

24 The court of appeal correctly reasoned that the prosecutor had  
25 a constitutional incentive to offer an attractive sentence to  
26 Petitioner in an effort to persuade him to accept a deal. The  
27 court found that the difference between Petitioner's ultimate  
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1 sentence and the initial offer reflected the number of counts of  
2 which Petitioner was convicted. Although Petitioner argues that no  
3 new facts were discovered after the initial offer, the appellate  
4 court noted that, in rejecting a plea offer, a defendant may face a  
5 more severe sentence because the trial court is allowed to take  
6 into consideration details from the trial at sentencing. The  
7 appellate court's reasoning highlights the essential difference  
8 between accepting a plea offer and exercising a right to trial,  
9 which the Supreme Court recognized in Bordenkircher, 434 U.S. at  
10 364 (noting that the risk of more severe punishment may factor into  
11 a defendant's decision to plead guilty but this risk analysis is  
12 inevitable and permissible).

13 The court of appeal's denial of Petitioner's claim was not  
14 contrary to or an unreasonable application of Supreme Court  
15 authority.

16 III. Right to Jury Trial for Prior Conviction and Eligibility for  
17 Probation

18 Petitioner claims that, although he waived his right to a jury  
19 trial, the facts that increased the penalty for his crime should  
20 have been found by a jury instead of the court. Relying on  
21 Apprendi v. New Jersey, 530 U.S. 466 (2000), Petitioner argues that  
22 the trial court judge made a determination of fact to conclude that  
23 he was not eligible for probation.

24 A. Right to Jury Trial for Prior Conviction

25 On remand from the U.S. Supreme Court, the California court of  
26 appeal upheld the trial court's sentence and rejected Petitioner's  
27 claim that the federal Constitution requires that a jury find the  
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1 existence of his prior conviction beyond a reasonable doubt.  
2 Resp.'s Ex. 15 at 18-19. The court found that, under California  
3 law, in waiving his right to a jury trial, Petitioner had consented  
4 to a trial of all the issues in the case before a court sitting  
5 without a jury. Resp.'s Ex. 15 at 19.

6 Furthermore, because it was the fact of Petitioners's prior  
7 conviction that had enhanced his sentence and denied him  
8 eligibility for probation, the court found that Apprendi did not  
9 apply. 530 U.S. at 490 (holding that, other than prior  
10 convictions, facts that would increase the penalty for a crime  
11 beyond the statutory maximum must be submitted to a jury and proved  
12 beyond a reasonable doubt). The state court concluded that, under  
13 U.S. Supreme Court precedent, no additional findings were required  
14 to justify Petitioner's sentence. Resp.'s Ex. 15 at 19.

15 Although it may increase the penalty for a crime, the  
16 existence of a prior conviction is not a fact that must be  
17 submitted to a jury and proved beyond a reasonable doubt.  
18 Apprendi, 530 U.S. at 490. In Blakely v. Washington, 542 U.S. 296,  
19 302-03 (2004), the Court applied its holding in Apprendi and  
20 reaffirmed that the finding of a prior conviction need not be  
21 submitted to a jury. In Cunningham v. California, the Court found  
22 that California's determinate sentencing law (DSL) violated  
23 Apprendi's brightline rule because circumstances in aggravation  
24 were found by the judge, not the jury, and needed only to be  
25 established by a preponderance of the evidence, not beyond a  
26 reasonable doubt. 549 U.S. at 288. However, Cunningham reiterated  
27 the Court's exception that prior convictions need not be found by a  
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1 jury. 549 U.S. at 274-75.

2       Petitioner's sentence was enhanced under California law for a  
3 prior conviction of sexual abuse. Under all U.S. Supreme Court  
4 authority, a prior conviction is excepted from the aggravating  
5 circumstances and additional factual findings that must be tried to  
6 a jury. The court of appeal correctly applied this exception when  
7 it determined that neither the California nor federal Constitution  
8 conferred the right to a jury trial to determine whether Petitioner  
9 suffered a prior conviction.

10       The state court's denial of Petitioner's claim was not  
11 contrary to or an unreasonable application of Supreme Court  
12 authority.

13       B. Right to Jury Trial for Probation Eligibility

14       Petitioner claims that determining his eligibility for  
15 probation under California Penal Code section 1203.066(c) required  
16 a finding of fact other than his prior conviction. That Penal Code  
17 section lists conditions that, if met, make probation possible for  
18 certain sex offenders.<sup>1</sup> The court of appeal found that Petitioner  
19 was ineligible for probation pursuant to California Penal Code  
20 section 1203.066(a)(5), which states that "probation shall not be  
21 granted to . . . a person who is convicted of committing a  
22 violation of section 288 . . . and who has been previously  
23 convicted of a violation of section 288." Resp.'s Ex. 15 at 20.  
24 The court found that Petitioner did not qualify for probation under  
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26       <sup>1</sup> Because the offense took place in 2002, Petitioner's  
27 eligibility for probation is dictated by California Penal  
28 Code § 1203.066 (2002).

1 California Penal Code section 1203.066(c) because it makes  
2 probation available to defendants whose eligibility is determined  
3 by sections 1203.066(a)(7), (8) or (9). Resp.'s Ex. 15 at 20.  
4 Probation is not available under section 1203.066(c) for offenders  
5 who are categorized by section 1203.066(a)(5), as Petitioner was.  
6 Because California law precludes a person twice convicted of  
7 violating Penal Code section 288 from being eligible for probation,  
8 the court denied Petitioner's appeal on this issue.

9 Petitioner's eligibility for probation is based on California  
10 statutory law and, thus, this claim is not cognizable for federal  
11 habeas relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).  
12 Even so, the court of appeal correctly found that under California  
13 Penal Code section 1203.066(a)(5), Petitioner is precluded from  
14 probation based on his prior conviction. Contrary to Petitioner's  
15 contention, the court did not have to engage in any fact finding  
16 and, as stated above, under Apprendi and Cunningham, Petitioner had  
17 no right to a jury trial to determine whether he suffered a prior  
18 conviction. Therefore, the court of appeal's denial of this claim  
19 was not contrary to or an unreasonable application of Supreme Court  
20 authority.

21 CONCLUSION

22 For the foregoing reasons, the petition for a writ of habeas  
23 corpus is denied. The Clerk of the Court shall enter judgment and  
24 close the file.

25 IT IS SO ORDERED.

26 Dated: July 22, 2010



27 CLAUDIA WILKEN  
28 United States District Judge

**United States District Court**  
For the Northern District of California

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